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No. 89-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES WOODS TELEVISION CORP.,
Petitioner,

v.

CAPITAL CITIES/ABC, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court should grant certiorari in a case in which (i) petitioner raises no real issue of constitutional law but instead simply reargues the facts and (ii) the sole federal question raised by petitioner was neither addressed to, nor decided by, the courts below.

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STATEMENT OF THE CASE

In this diversity case, the district court entered judgment notwithstanding the verdict in favor of respondent Capital Cities/ABC, Inc. ("ABC") [1] after concluding that petitioner Charles Woods Television Corp. ("Woods") [2]

[1] Pursuant to Supreme Court Rule 28.1, Respondent Capital Cities/ABC, Inc. declares that it has no corporate parents or affiliates. Capital Cities/ABC, Inc. has two subsidiaries: (i) ESPN, Inc., and (ii) Practical Home Owner Publishing Company. For purposes of this declaration, "corporate parent" refers to any company that owns a majority interest in another company. "Affiliates" and "subsidiaries" refer to entities in which Capital Cities/ABC, Inc. owns a majority but not a one hundred percent interest.

[2] Throughout this brief, Charles Woods Television Corp. and Woods Communications Group, Inc. will be referred to collectively as "Woods." The sole shareholder and chief executive officer of both of these companies, Mr. Charles Woods, will be referred to as "Mr. Woods."

had failed to present a submissible claim of fraud.[3] After reviewing the trial record in the light most favorable to Woods, the court of appeals affirmed. The court of appeals subsequently denied Woods' petitions for rehearing and rehearing en banc.[4] Woods now petitions for certiorari on the ground that the courts below violated its Seventh Amendment right to a jury trial. Woods' petition does not raise a substantial constitutional claim but instead simply asserts for a third time a claim of common law fraud that both courts below rejected as completely unsupported by the record evidence. Woods' petition should be denied because the courts below acted well within their authority in granting and affirming judgment n.o.v.

* * * *

Woods' statement of the case is egregiously at odds with the record facts, which are accurately and exhaustively set forth in the opinions of the district and circuit courts. The record facts may be summarized as follows:

First: In January 1985 Woods entered into a contract to purchase Springfield, Missouri television station KMTC from Midland Television Corp. ("Midland") for $13 million. At that time, KMTC was affiliated with the ABC television network. In accordance with the then applicable FCC regulation, the affiliation agreement between Midland and ABC was limited to a term of two years and permitted either party (*i.e.*, network or affiliate) to can-

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[3] The opinion of the United States District Court for the Western District of Missouri is reprinted at pages A1-A13 of the Appendix to the Petition. The district court opinion indicates incorrectly that judgment is to be entered in favor of Woods. The district court subsequently issued a correcting order and judgment.

[4] The opinion and subsequent order of the United States Court of Appeals for the Eighth Circuit are reprinted at pages A14-A27.

cel the agreement for any reason whatsoever, or no reason at all, upon six months' written notice.[5]

Second: After entering into the contract to purchase KMTC, Woods repeatedly sought assurances from ABC that KMTC would retain the ABC affiliation. Instead of assurances, Woods received "repeated warnings of a potential switch." A23 (8th Cir.). In a series of "red-light" letters, Trial Transcript at 160, 211 (quoting Mr. Woods), ABC warned Woods that it was actively considering switching its affiliation from KMTC to KSPR, a competing independent station in Springfield. From these letters as well as other oral warnings, Mr. Woods became "fully aware that the ABC affiliation was 'up for grabs.'" A8 (Dist. Ct.) (quoting Mr. Woods). Mr. Woods thus decided not to go through with his purchase of KMTC because the affiliation was at risk. A18 (8th Cir.).

Third: On June 20, 1985, ABC sent identical letters to Woods, Midland, and the owner of KSPR stating that it had "decided to defer" its decision on the Springfield affiliation for at least the balance of 1985. Mr. Woods admitted that, even after receiving the June 20 letter, "I still was not going to buy the station because the affiliation was still in doubt." A23 (8th Cir.) (quoting Mr. Woods).

Fourth: Mr. Woods subsequently decided to go through with the purchase after all. He admitted that he changed his mind because his broker suggested " 'a plan whereby

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[5] The regulation provided:

> *Term of affiliation.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original terms, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than 2 years: *Provided,* That a contract, arrangement, or understanding for a period up to 2 years may be entered into within 6 months prior to the commencement of such period.

47 C.F.R. § 73.658(c) (1985), *repealed*, 54 Fed. Reg. 14,961 (1989).

in the highly unlikely event that we didn't get the affiliation agreement—if it were cancelled—there would be a reduction in price on the station.'" A23-24 (8th Cir.) (quoting Mr. Woods). On June 24, 1985, four days after the June 20 letter, Mr. Woods directed his broker to renegotiate Woods' contract with Midland and secure a contingent price arrangement: $13 million if the station remained an affiliate; $8 million if, at any time prior to July 3, 1986, ABC gave notice that it was terminating the affiliation.

Fifth: Woods' entire case rests on the theory that ABC reached a decision to switch affiliates in late May or early June 1985 and then falsely represented in the June 20 letter that no decision had been made. However, the "undisputed evidence" at trial showed that ABC had not reached a decision in 1985. A22 (8th Cir.). To the contrary, every single witness with relevant knowledge testified under oath that prior to Woods' purchase ABC had made no decision. A7-A8, A11 (Dist. Ct.).

Sixth: The uncontradicted testimony and contemporaneous documentary record show that, as promised, in late 1985 and early 1986 ABC carefully re-examined the Springfield situation and ultimately made a bona fide decision to switch affiliates. A21-A22 (8th Cir.). The record includes extensive written analyses prepared by ABC officials in the period following the June 20 letter comparing the performance of stations in the Springfield market and assessing whether ABC's business interests would best be served by a station switch.

Seventh: During late 1985 and early 1986, Mr. Woods repeatedly demanded a decision from ABC in an apparent attempt to assure either that KMTC's affiliation would be renewed or that he would get the benefit of the $5 million contingent price arrangement before it expired. On April 3, 1986, ABC notified Woods that it had decided to terminate its affiliation with KMTC (by then renamed KDEB) and switch its affiliation to KSPR. Pur-

suant to the contingent price arrangement, Woods ultimately paid $8 million rather than $13 million for KDEB.

ARGUMENT

The Court does not sit in its certiorari jurisdiction merely for the purpose of reviewing all lower court decisions for possible errors of fact or law. *See NLRB v. Hendricks County Rural Electric Co.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam). Instead, there must be "special and important reasons" for granting certiorari. Sup. Ct. R. 17.1. *See Ross v. Moffitt*, 417 U.S. 600, 617 (1974). No such reasons are presented here. This case does not even remotely resemble a situation in which the lower courts are in conflict on a crucial issue of federal law or have radically departed from the accepted course of judicial proceedings. Woods' petition does nothing more than reargue the facts and claim errors in the lower courts' application of settled principles of Missouri state law. Such a petition does not merit certiorari review.

Woods casts its fact-specific arguments in terms of the right to a jury trial, asserting that the district and circuit courts violated the Seventh Amendment by granting judgment n.o.v. Woods so utterly failed to present this argument below that it was not mentioned in the detailed opinions of either the district or circuit courts.[6] In

[6] Although Woods briefly adverted to the Seventh Amendment right to trial by jury in its post-trial briefs to the district court, Woods never claimed that an order granting judgment n.o.v. would violate the Seventh Amendment. In its voluminous briefs on the merits in the court of appeals, Woods never once even mentioned the Seventh Amendment, let alone claimed that it had been violated. Woods' first and only mention of the Seventh Amendment in the court of appeals was a terse reference in its petition for rehearing filed after a three-judge panel of the Eighth Circuit had unanimously affirmed the decision of the trial court. *See United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980) (Court will consider issues not raised and decided below only under "exceptional circumstances").

any event, this Court has plainly and repeatedly rejected the notion that the power to grant judgment n.o.v. is in some way inconsistent with the Seventh Amendment. *See, e.g., Neely v. Martin K. Eby Construction Membership Corp.*, 386 U.S. 317, 321 (1967) ("it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial"). *See also Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940). Moreover, this Court has held that granting judgment n.o.v. is wholly appropriate, and in fact required, where, as here, the plaintiff has failed to present a submissible case. *See Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2519 (1988). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

This case is not among the rare cases in which the Seventh Amendment is implicated because a lower court has usurped the function of the jury. Instead, in detailed opinions analyzing the evidence, both lower courts concluded that Woods failed to establish numerous essential elements of fraud. Thus, Woods failed to prove the essential element of misrepresentation because the "undisputed evidence" showed that ABC had not made a decision in 1985. A21, A22 (8th Cir.). *See also* A8-A9 (Dist. Ct.). Woods failed to establish the essential element of intent because there was "no evidence" that ABC intended to induce Woods to purchase KMTC. A23 (8th Cir.). *See also* A7 (Dist. Ct.). Woods failed to prove the essential element of reliance because, in going through with the purchase of KMTC, Mr. Woods "did not rely on anything ABC said," A9 (Dist. Ct.), but instead relied "on his own business judgment that the price reduction he negotiated would protect him from the known risk that the station could lose the affiliation." A24 (8th Cir.). And Mr. Woods protected himself fully against damages—another essential element of fraud—by securing the contingent price arrangement. A10 (Dist. Ct.). *See also* A24 (8th Cir.). Any one of these failures of

proof was fatal to Woods' fraud claim.[7] Collectively they establish beyond doubt that the trial court properly entered judgment n.o.v. and that the Eighth Circuit properly affirmed.

The petition should be denied.

Respectfully submitted,

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[7] *See Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1218 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) (failure of proof on any element of fraud is fatal to entire claim). *See also Country Shindig Opry, Inc. v. Cessna Aircraft Co.*, 780 F.2d 1408, 1411 (8th Cir. 1986) (listing elements of fraud under Missouri law).